No. 77-352

In the Supreme Court of the United States

OCTOBER TERM, 1977

JOHN D. PLESONS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 560 F. 2d 890.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on August 8, 1977. The petition for a writ of certiorari was filed on September 6, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the government's failure to warn petitioner of his Fifth Amendment privilege against compulsory self-incrimination before he was called to testify before the grand jury or when it served a documentary subpoena on

him required the suppression of his grand jury testimony or of the documents tendered in response to the subpoena.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted of distribution of and conspiracy to distribute dilaudid, preludin, and desoxyn, in violation of 21 U.S.C. 841(a)(1) and 846. He was committed to the custody of the Attorney General under 18 U.S.C. 4208(c).[1] The court of appeals affirmed (Pet. App. A).

1. The evidence showed that petitioner, a physician, entered into a scheme with Peggy Linze and Lawrence Smith pursuant to which petitioner was provided with the services of prostitutes in exchange for blank prescription forms and bogus prescriptions that were used by Linze and Smith to obtain drugs for illicit distribution.[2] Petitioner wrote some of these fraudulent prescriptions in the names of actual patients, who testified at trial that they received neither the prescriptions nor the drugs.[3] Petitioner also issued other prescriptions for nonmedical

[1]That statute provides, in effect, for delayed sentencing by the district court pending preparation and receipt of a detailed study of the prisoner. We have been advised that the district court has postponed the exercise of its sentencing discretion under the statute pending the disposition of this petition.

[2]Peggy Linze pleaded guilty to two counts of a ten count indictment and testified at petitioner's trial as a government witness (T. 668-763). Her testimony was corroborated by three of the prostitutes she had recruited for petitioner (T. 493-494, 495-496, 766, 900).

[3]These witnesses also contradicted petitioner's patient records, which noted alleged health problems for which the drugs were ostensibly prescribed (Pet. App. A-6).

purposes to persons his co-conspirators had referred to him. In addition, narcotic prescriptions were forged by the co-conspirators on forms that petitioner had supplied (T. 179-185, 208-210, 222, 235-236, 250-252, 293-294, 413-414, 423, 460-475, 493-496, 643-651, 674, 681-682, 684-686, 702, 766, 900).

Linze, who was under investigation for narcotics trafficking, made sales of preludin ("speed") and dilaudid (a heroin substitute) to undercover officer Ted Zinselmeier (T. 44-46, 63, 66, 68, 72-73, 74, 82). In August 1976 Linze and Smith were followed by Zinselmeier and other officers to the Del Crest Pharmacy, which was operated by another co-conspirator, Bernard Kershman, who filled the fraudulent prescriptions in return for receiving stolen merchandise (T. 79-81, 690-692). Two weeks later, after agreeing to supply Officer Zinselmeier with a large quantity of dilaudid, Linze and Smith were arrested as they left the Del Crest Pharmacy in possession of the drugs (T. 84-85, 99-101). Blank prescription forms from petitioner's pads were discovered in Smith's car (T. 102). The pharmacy was searched pursuant to a warrant, and 177 drug prescriptions on petitioner's forms, including a number in his handwriting, were seized (T. 159-160, 167-168, 330-441).[4]

2. On September 15, 1976, petitioner was subpoenaed to appear and testify before the grand jury on the following day. Petitioner was asked to bring with him his records for twenty individual patients (Pet. App. A-2 to A-3). Upon receiving the subpoena, petitioner contacted an attorney (T. 9; Pet. App. A-8), who told him to comply

[4]Petitioner testified that he had written the prescriptions for legitimate medical purposes and denied any complicity in the conspiracy (T. 785-819).

with the subpoena if he had nothing to hide (T. 29). The attorney appeared in the courthouse after petitioner testified on September 16, 1976, and accompanied him while he gave handwriting exemplars (T. 24; Pet. App. A-9). Approximately two weeks later petitioner received a subpoena for his patient records. Although he had 10 days to comply, petitioner, who had already consulted counsel about the records, surrendered them immediately (Pet. App. A-3, n. 2).

ARGUMENT

1. Petitioner contends (Pet. 6-11) that the failure of the government to apprise him of his Fifth Amendment privilege against self-incrimination required suppression of his grand jury testimony and of his subpoenaed records.[5] There is, however, no occasion to reach this issue with regard to petitioner's grand jury testimony, since "at oral argument [in the court of appeals] counsel for [petitioner] abandoned the claim concerning the grand jury testimony because of the limited use which had been made of it at trial" (Pet. App. A-3). There are no "exceptional circumstances" requiring that this Court confront that issue now. *E.g.*, *United States* v. *Lovasco*, No. 75-1844, decided June 9, 1977, slip op. 5, n. 7. Moreover, petitioner conceded that his testimony was used sparingly at trial (Pet. App. A-3),[6] and, as the court

[5]Petitioner also argues (Pet. 5) that he was never warned that he was a "putative" defendant. "Putative defendant" status, however, "neither enlarges nor diminishes" the protection of the Fifth Amendment, and a witness need not be warned of the fact that he is a potential defendant. *United States* v. *Washington*, 431 U.S. 181, 189.

[6]As petitioner appears to acknowledge (Pet. 5), only brief references to petitioner's grand jury testimony were made on cross-examination to refresh his memory, and they did not contradict his trial testimony (T. 822-824, 827).

of appeals ruled (*ibid.*), the failure to give petitioner warnings, if error at all, was harmless.

At all events, the test for determining whether an accused has been "*compelled* to give self-incriminating testimony * * * is whether, considering the totality of the circumstances, the free will of the witness was overborne." *United States* v. *Washington*, 431 U.S. 181, 188 (emphasis in original). There is nothing in this case that remotely suggests that petitioner's will was overborne when he gave his grand jury testimony.[7]

2. Petitioner's related assertion—that the government is required to give warnings regarding the privilege against compulsory self-incrimination whenever it serves a documentary subpoena—is equally unpersuasive.[8] The

[7]Petitioner was a sophisticated witness who had consulted with counsel prior to his grand jury appearance. In addition, by contrast to the incommunicado setting in which police interrogation occurs (*Miranda* v. *Arizona*, 384 U.S. 436, 448), grand jury questioning takes place before a panel of private citizens, under the overall supervision of a district court judge, and a transcript is often made of the proceedings (as was done in the instant case). Accordingly, in the unlikely event that coercive tactics were employed during petitioner's grand jury interrogation (see *United States* v. *Mandujano*, 425 U.S. 564, 580), that would be readily detectable and reviewable. Neither here nor in the court of appeals has petitioner pointed to a single example of coercion.

In our brief in *United States* v. *Washington*, *supra*, we set forth at length our reasons for believing that the Fifth Amendment does not require the government to give *Miranda*-type warnings to grand jury witnesses. We are sending petitioner's counsel a copy of that brief.

[8]Petitioner's suggestion (Pet. 9) that the documentary subpoena was tainted because "based on information [he] was called upon to give as a Grand Jury witness" has no support in the record. As noted (*supra*, p. 3), many of the prescriptions seized in the search of the pharmacy were written by petitioner in the names of legitimate patients. Although petitioner's patient records were not actually subpoenaed until over two weeks after his grand jury testimony, the government was alerted to their significance well before petitioner's grand jury appearance.

subpoena was served upon petitioner in his office and he was neither interrogated nor taken into custody. He had the assistance of counsel "since the beginning" and had conferred with him about the grand jury's interest in his records (Pet. App. A-8; T. 9). In short, petitioner has offered no reason to believe that, in his case or any other, the mere service of a subpoena is even remotely comparable to the inherently coercive atmosphere of in-custody interrogation upon which the rationale of *Miranda* rests. See *United States* v. *Washington, supra*, 431 U.S. at 187, n. 5; *Beckwith* v. *United States*, 425 U.S. 341.

Moreover, as noted by the court of appeals (Pet. App. A-7), petitioner has not cited "any incidents or circumstances which would give us cause to believe his free will was overborne" in responding to the documentary summons. Accordingly, warnings were not necessary and, since petitioner did not invoke the protection of the Fifth Amendment, his compliance with the subpoena cannot be considered to have been "compelled" within the meaning of the privilege. See *Garner* v. *United States*, 424 U.S. 648, 654-656; *United States* v. *Monia*, 317 U.S. 424, 427.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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